IN THE SUPREME COURT
OF THE
UNITED STATES

Office Supreme Court
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MAR 7 19
JAMES H. McKENNEY

JOHN M. SLOAN, ET AL.,
APPELLANTS.

VS.

THE UNITED STATES OF AMERICA, ET AL.,
APPELLEES.

AND TWENTY-TWO OTHER CASES, BEING NOS. 453 TO 475, INCLUSIVE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF APPELLANTS.

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STATEMENT OF CASES.

In the year 1901 twenty-five several claimants for allotments of land upon the Omaha Indian Reservation filed their separate bills of complaint in the Circuit Court of the United States for the District of Nebraska to obtain such allotments. The issues were made up in each case. A large portion of the evidence taken, being applicable to all the cases, by agreement of counsel they were tried

together (page 18 of record), but a separate decree was entered on the 8th day of November, 1902, in each case.

In two of the cases decrees were entered for complainants, finding they were entitled to allotments as prayed. In the twenty-three remaining cases the relief sought was denied. A separate assignment of errors was filed in each case by the defeated party, and on the 13th day of October, 1903, an appeal was allowed in each case and the record brought to this court, being Nos. 453 to 475 here. The jurisdiction of the Circuit Court was invoked pursuant to the Act of Congress of August 15, 1894, as amended on February 6, 1901. So much of this act as is material in the consideration of these cases reads as follows:—

> "That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part, of Indian blood or descent, to any allotment of land under any law or treaty, and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant; and the judgment

or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency; *Provided,* That the right of appeal shall be allowed to either party as in other cases." (31 U. S. 760.)

The lands in controversy are within the boundary of the Omaha Indian Reservation, in Thurston county, in the State of Nebraska. At the time of the Louisiana Purchase in 1803, the Omaha tribe of Indians was located upon and in possession of land lying upon both sides of the Missouri river, in what is now the states of Nebraska and Iowa.

The rights of appellants in these cases depend upon the construction to be given to portions of the several treaties made by the General Government with the Omaha tribe, and acts of Congress relating thereto. We print herewith so much of the several treaties and Congressional enactments as are relevant to the issues presented in these cases. In 1830 a treaty was made between the United States and various tribes of Indians, including the Omahas. By virtue of which large tracts of land theretofore occupied by these tribes, whether separately or in common, were ceded to the United States, and in return for such cession various provisions for the benefit of the Indians were made by the Government. The only provisions of this treaty relevant to the controversy here are articles ten and twelve.

"Article X. The Omahas, Ioways and Ottoes for themselves, and in behalf of the Yanckton and the Santie bands of Sioux, having earnestly requested that they might be permitted to make some provisions for their half-breeds, and particularly that they might bestow upon them the tract of country within the following limits, to-wit: Beginning at the mouth of the Little Ne-mohaw River, and running up the main channel of said river to a point which will be ten miles from its mouth in a direct line; from thence in a direct line to strike the Grand Ne-mohaw ten miles above its mouth, in a direct line (the distance between the two Ne-mohaws being about twenty miles); thence down said river to its mouth; thence up, and with the meanders of the Missouri River to the point of beginning, it is agreed that the half-breeds of said tribes and bands may be suffered to occupy said tract of land; holding it in the same manner, and by the same title that other Indian titles are held; but the President of the United States may hereafter assign to any of the said half-breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section, of six hundred and forty acres to each individual. And this provision shall extend to the cession made by the Sioux in the preceding article.

"Article XII. It is agreed that nothing contained in the foregoing articles shall be so construed as to affect any claim, or right in common, which has heretofore been held by any tribes, parties to this treaty, to any lands not embraced in the cession herein made; but that the same shall be occupied and held by them as heretofore."

TREATY WITH THE OMAHA, 1854.

Articles of agreement and convention made and concluded at the City of Washington, this sixteenth day of March, one thousand eight hundred and fifty-four, by George W. Manypenny, as commissioner on the part of the United States, and the following named chiefs of the Omaha tribe of Indians, viz.: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-nah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Ta-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; So-da-nah-ze, or Yellow Smoke; they being thereto duly authorized by said tribe.

"Article 1. The Omaha Indians cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: Provided, however, That if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in counsel

express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent, than three hundred thousand acres, and then and in that case, all of the country belonging to said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

Article 4. In consideration of and payment for the country herein ceded, and the relinquishments herein made, the United States agree to pay to the Omaha Indians the several sums of money following, to-wit:

First.—Forty thousand dollars, per annum, for the term of three years, commencing on the first day of January, eighteen hundred and fifty-five.

Second.—Thirty thousand dollars per annum, for the term of ten years, next succeeding the three years.

Third.—Twenty thousand dollars per annum, for the term of fifteen years, next succeeding the ten years.

Fourth.—Ten thousand dollars per annum, for the term of twelve years, next succeeding the fifteen years.

All which several sums of money shall be paid to the Omahas, or expended for their use and benefit, under the direction of the President of the United States, who may from time to time determine, at his discretion, what proportion of the annual payments,

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in this article provided for, if any, shall be paid to them in money, and what proportion shall be applied to and expended, for their moral improvement and education; for such beneficial objects as in his judgment will be calculated to advance them in civilization; for buildings, opening farms, fencing, breaking land, providing stock, agricultural implements, seeds, etc.; for clothing, provisions and merchandise; for iron, steel, arms and ammunition; for mechanics, and tools, and for medical purposes.

Article 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve.

Article 6. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not ex-

ceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a state constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the state shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof after all the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations,

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as may hereafter be prescribed by the Congress or President of the United States. No State Legislature shall remove the restrictions herein provided for, without the consent of Congress.

Article 11. The Omahas acknowledge themselves indebted to Lewis Sounsosee (a half breed), for services, the sum of one thousand dollars, which debt they have not been able to pay, and the United States agree to pay the same."

On March 6th, 1865, another treaty was entered into between the United States and the Omaha Tribe of Indians, article IV reading as follows:—

"Article IV. The Omaha Indians, being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them, to be cultivated and improved for their own individual use and benefit, it is hereby agreed and stipulated that the remaining portion of their present reservation shall be set apart for said purposes; and that out of the same there shall be assigned to each head of a family not exceeding one hundred and sixty acres, and to each male person, eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The lands to be

so assigned, including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well defined exterior boundary. The whole of the lands, assigned and unassigned, in severalty shall constitute and be known as the Omaha Reservation, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes, shall have full force and effect, and no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said reservation without the written permission of the Superintendent of Indian Affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom they have been assigned respectively, and that they are for the exclusive use and benefit of themselves, their heirs, and descendants; and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale or forfeiture, unless otherwise provided for by Congress."

U. S. Statutes at Large, Vol. 14, p. 667.

Sections 5 and 6 of the Act of Congress of August 7, 1882, are as follows:—

"Sec. 5. That with the consent of said Indians as aforesaid the Secretary of the Interior be and he

is hereby authorized, either through the agent of said tribe or such other porson as he may designate, to allot the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company under the agreement of April 19th, 1880, approved by the Acting Secretary of the Interior July 27th, 1880, in severalty to the Indians of said tribe in quantity as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child, under eighteen years of age, one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March 6, 1865, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided; *Provided*, That any Indian to whom a tract of land has been assigned, and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article and who has made valuable improvements thereon, and any Indian who, being entitled to a assignment and certificate under said article has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section: *Provided Further*, That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for their minor children, and the agent shall select for

each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

"Sec. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments shall have been made, or in case of his decease, of his heirs, according to the laws of the State of Nebraska, and that at the expiration of said period, the United States will convey the same by patent to said Indian or his heir as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void; *Provided*, That the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered."

22 U. S. Statutes, 341.

The Indian Appropriation Act, approved March 3, 1893, contained the following provision relative to these Indians:—

"That the act of Congress, approved August seventh, eighteen hundred and eighty-two, entitled, 'An act to provide for the sale of a part of the reser-

vation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes,' be and the same is hereby amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands: *Provided*, That the allotments so made shall be subject to the same conditions, restrictions and limitations provided for in sections six, seven and eight of said act touching allotments and patents to allottees therein mentioned. And provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations."

FAMILY HISTORY.

All the complainants in the cases numbered 460, 461, 462 and 474 are descendants of La-ta-da-we, an Omaha Indian woman of full blood. (Pages 488 and 489 of Record.)

All the other complainants are descendants of Taegleha Hacienda, a full blood Omaha Indian woman. (Pages 62 to 65, inclusive, 336 to 341 inclusive, of Record. Table page 244.)

La-ta-da-we was married to Francis Bono, a white man, in the year 1839, in the Indian country. There was born to them a daughter, Mary Bono, who married Mitchell Monette, a white man. Jennie M. Arnold, nee Monette, Mitchell Monette and Cassie M. Karch, nee Monette, are the children of Mary Bono and Mitchell Monette. (Pages 488 and 489 of Record.)

Taegleha Hacienda was married to Michael Barada, and the table showing their descendants is at page 244 of the Record.

The children of this marriage were Margaret, who subsequently married Thomas Sloan, Antoine Barada, Mary Jane, whose first husband was Francis Cabana, and whose second husband was Louis Paul, and Popoin, whose husband was Joshua Pilcher. All of the descendants of Taegleha Hacienda and of La-ta-da-we are members of the Omaha tribe of Indians and entitled to allotments under the treaties and acts of Congress relating thereto. All of these descendants are similarly circumstanced.

The descendants of Popoin Barada and Mary Jane Paul have all been recognized by the department and have received allotments. A portion of the descendants of Antoine Barada have been recognized and allotments have been made to them. Certain of the descendants of Antoine Barada, and all of the descendants of Margaret Barada have been denied allotments. (Page 244 of Record.) The claims of the persons thus denied are involved in these appeals.

It is not disputed there is within the limits of the Omaha reservation sufficient land for these claimants and for every other member of the tribe entitled thereto. The

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appellants in each case in the manner prescribed by the department in that behalf made selection of lands for allotment, and where not prevented by the Department are occupying and improving such lands.

Photographs showing the homes erected and improvements made by these complainants are upon file as original exhibits. The complainants are cultivating the land, educating their children and following the wishes of the General Government in this behalf.

USAGE AND CUSTOM.

It was the usage and custom among the Omaha Indians, and it is now the custom among them to enroll and recognize as members of the tribe any children born to a member of the tribe. A child of a white man not a member of the tribe and of an Indian mother a member of the tribe, is enrolled and recognized as member of the tribe.

Under this usage and custom all of the appellants are members of the tribe.

That this is the usage and custom is shown by the following reference to the record:

The first annuity rolls of the Omaha tribe of Indians made in 1855, show the names of half-breed Indians and their children paid and recognized as members of the tribe. (Pages 35 to 51 of Record.)

List of children of white men allotted lands on the Omaha Reservation to the number of 33. (Page 53 of Record.)

List of annuity payments to half-breed and mixed

blood Indians of the Omaha tribe, paid as members of the tribe, and ranging in ages from 2 months to 68 years, to the number of 79. (Pages 54 and 55 of Record.)

The following is a list of children of white fathers and mixed blood Indian women who have been allotted land, which children were born off the reservation, and at the time of their birth neither parent was borne upon the tribal rolls:

Elsie Fuller.
Susan E. Fuller.
Louis Fuller.
Anna L. Fuller.
George T. Fuller.
Charles E. Fuller.
Isabel Fuller.
George T. Scott.
Wesley Scott.
Eliza Campbell.
Ida Campbell.
Wm. H. Campbell.
Pearly Campbell.
Florence Campbell.
Julia Campbell.

List of children born to white women and mixed blood Indian fathers living off the reservation at the time and when neither parent was carried upon the tribal rolls:

Josephine Filson.
Charles Pilcher.
Mary V. Pilcher.
Mary Cabana.
Francis Cabana.
Reuben Cabana.

The proof shows the above list to be true and correct. (Pages 232 and 233 of the Record.)

TESTIMONY OF WM. F. SPRINGER.

Ques. "Is it not the duty of the agent to enter up the name of such child whether he cares to approve of it or not under the custom?"

Ans. "Well, I do not know to that extent, but I know that where a parent, either mother or father, is a

member of the tribe and has a child born to them, that it has been the custom to put that child upon the roll as recognized member of the tribe." (Page 127 of Record.)

CHAS. P. MATHEWSON, Agent Omaha Tribe Indians.

Ques. "During the past twelve years what has been the custom in regard to the enrollment of those children born of Indian women of full blood, or part Indian blood being issued by white men?"

Ans. "They have been placed upon the rolls."

Ques. "Upon what representation to you or through agent during that period?"

Ans. "The same as other members of the tribe."

Stipulation of Anna Cabana. (Pages 76, 77, 78 of Record.)

Lists of allotments of children of white men and mixed blood Indian women. (Pages 79, 80, 81, 82, 83 of Record.)

As to showing the custom of recognition and enrollment of numerous children of white fathers, we call attention to the testimony of Wm. F. Springer. (Pages 121 to 125 of Record.)

Children born off the reservation and recognized as members of the tribe.

Testimony of Antoine Cabana. (Pages 107 to 116 of Record.)

The opposition to these claimants is not founded on any valid or reasonable objection to them, as is shown by the testimony of two witnesses called by the Government.

(Richard) Charles Robinson (whose Indian name is Munca-wa-tha), a witness produced in behalf of the defendants, being first duly sworn, testified as follows:

Hiram Chase, being duly sworn, acted as interpreter.

Q. Have the Omaha Indians as a tribe been opposed to Mary Monette and the other persons who have these pending suits being adopted in the tribe or receiving allotments of lands?

A. The people have said that they did not want to take them into the tribe, and they do not know them.

Q. Did the Indian council make known their objections to these people who have these pending suits to the allotting agent, Fletcher, and to the allotting agent, Rankin?

A. He says that one reason of not taking these people in was Miss Fletcher's influence and cause.

Q. Do you know Wood Tick?

A. Yes, sir; he is my friend.

Q. When you called on Mrs. Monette, she spoke to you in the Omaha language, did she not?

A. Yes, sir.

Q. And you knew her mother, did you not, La-ta-da-we?

A. Yes, sir.

Q. You want this Omaha woman cut off of her rights for allotment, do you?

A. Yes, sir.

Q. You felt that way for a good many years?

A. Yes, sir. (Page 500 of Record.)

Hiram Chase, a witness, produced in behalf of the defendants, first duly sworn, deposes and says as follows:

Q. About that time, Mr. Chase, you were interested with Tom Sloan and others, in trying to get some allotments for the mixed bloods, were you not?

A. Not just at that time, but after Mr. Sloan and Aunt Margaret Sloan, as we used to call her, were here, and I had very friendly relations with them on account of a statement made to me in our Iudian family that she was actually related to our ancestors on the Indian side, that she had come from the same Indian stock that I had, and my part in the matter has been this, that under those influences and relations that I had with the Sloans on account of my kinship with them, seeing that other people from the Nemaha reservation had lands, that were not here in 1865, I looked on it as a matter of being morally unjust. I did not look at the legal phase of it at that time, and I did not care, and it was through those influences that impelled me to take the stand that I did at these times, not knowing all the legal phases that have come up with reference to these matters.

Q. And it was that interest which you felt for Margaret Sloan that you above described that in a measure prompted your personal feeling toward Miss Fletcher?

A. A good deal of it; there is not only that Mr. Webster. There is my own affairs. It was over partiality with certain families here among the Omahas which I think were not as much entitled to regard from the officials of the Government as even myself. I do not state it as a matter of boast, but as a matter of fact; it was

over partiality with those families to disregard entirely the families that had descended from actual Omaha Indians.

Q. That had reference to the mixed bloods and not as against the full blood Omaha Indians?

A. Yes, sir; I want the thing amicably settled, and have the mixed bloods and the full bloods united in one body, and it would be a benefit to both people, mixed bloods as well as the others. That is one view I take of it.

Q. You were looking at it from a philosophical standpoint?

A. Some, I do not know as it cuts any figure. (Pages 505 and 506 of Record.)

ALLOTTEES UNDER THE TREATY OF 1830 HAVE RECEIVED ALLOTMENTS UNDER SUBSEQUENT ACTS.

The following is a partial list of mixed bloods who received allotments on the Nemaha reservation under the provisions of article ten of the treaty of July 15th, 1830, who have since received allotments under later acts:

Treaty of 1830.	Act of 1882.
Henry Fontenelle.	Henry Fontenelle.
L. Albert Fontenelle.	Lucien Albert Fontenelle.
Susan Neals.	Susan Neals.
Louis Saunsoci.	Louis Saunsoci.
Susette La Flesche.	Susette Tibbles.
Emily Barnaby.	Emily Campbell.
Julia Barada, daughter of Antoine Barada.	Julia Provo.
Mary Jane Paul, sister of Margaret Sloan.	Mary Jane Paul.
Madeline Paul, niece of Margaret Sloan.	Madeline Scott.
Eliza Paul, niece of Margaret Sloan.	Eliza Wheeler.
Elizabeth Paul, niece of Margaret Sloan.	Elizabeth Baylis.
Louisa Paul, niece of Margaret Sloan.	Louisa Atkins.
Prisa Paul, niece of Margaret Sloan.	Theresa Fuller.
Antoine Paul, nephew of Margaret Sloan.	Antoine Cabana.
John Pilcher, nephew of Margaret Sloan.	John Pilcher.

Treaty of 1830.	Act March 3, 1893.
Mary La Flesche.	Mary La Flesche.
Louis Neal.	Louis Neal.

Clara Barada, daughter of Antoine Barada, was allotted on the Nemaha Reservation. She has been since allotted as Clara Dupuis and all her children. That the allotments to them are on the Iowa Reservation.

John Dupuis and Francis Dupuis, who were allotted on the Nemaha Reservation, have since been allotted on the Iowa Reservation.

Daniel Godfrey, who was allotted land on the Nemaha Reservation, has since been allotted land on the Iowa Reservation.

Emily Fontenelle, who was allotted land on the Nemaha Reservation, has been allotted other lands on the Pawnee Reservation.

Antoine Robidoux, who was allotted lands on the Nemaha Reservation, has since been allotted lands on the Otoe Reservation, in Indian Territory.

Leon Connoyer, who was allotted lands on the Nemaha Reservation, has since been allotted lands on the Rosebud Sioux Reservation in South Dakota.

That Henry Didier, who was allotted lands on the Nemaha Reservation, has since, with his children, been allotted land on the Rosebud Sioux Reservation. His wife is a white woman.

That John Cordier and Charles Cordier, who received allotments on the Nemaha Reservation, have since received allotments on the Rosebud Sioux Reservation. (See Record, pages 81 and 82.)

The following names, taken from the schedule approved by the United States Indian Agent, December 23rd, 1870, being a list of the assignments of land in severalty

under the provision of the fourth article of the treaty of March 6th, 1865, being pages 171 to 183, inclusive, of the Record, are persons who received allotments under the tenth article of the treaty of July 15th, 1830:

No. 59, Henry Fontenelle.	No. 324, Theresa Fuller.
No. 69, John De Roine.	No. 328, Madaline Scott.
No. 98, Rosalie Spafford.	No. 329, Elizabeth Moncravie
No. 254, Louis Saunsoci.	No. 330, Lizzie Paul.
No. 320, Antoine Cabana.	No. 331, Louisa Paul.

That the last six named persons were not residing upon the Omaha Reservation on the date of March 6th, in 1865, nor at any time during that year, as shown by the Record, page 77. That the list upon page 82 of the list shows allotments to the persons named under the treaty of 1830.

The consent of the Omaha tribe to the allotting of their lands pursuant to the act of 1882, was given in May, 1883. (See Record, pages 366 and 368.)

The facts respecting the individual claimants, briefly stated, are as follows:

CASE NO. 453.

MARGARET SLOAN, a daughter of Taeglaha Hacienda, was born in 1805. She was married to Thomas Sloan in 1830 and was at the Omaha Agency from 1855 to 1857, when she made a selection of land for allotment on the Nemaha reservation. Subsequently, in 1858, and during the years of 1858 and 1859, she lived with her husband and family in a home built by them upon the Omaha reservation, removing to the Nemaha reservation in 1859

and residing with her family there until 1881. She went back to the Omaha reservation in 1881 and resided there until her death, which occurred in December, 1898. She was upon the Omaha reservation and was actually residing there when the act of 1882 became operative. (Page 63, Record.)

This suit was brought in her own name to recover her allotment. After her death it was revived in the name of her heirs at law. The court below denied relief upon the construction that her right to an allotment did not descend to her heirs, and because she had received an allotment upon the Nemaha reservation. (Page 258, Record.)

It appears without contradiction that upon the first annuity role prepared for a per capita payment to the members of the Omaha Tribe of Indians, Margaret Sloan and her family were enrolled. (See Record, page 35.) Not being present at the general payment, when the other members of the tribe were paid, she and another half-breed woman, with their families, were paid upon a separate supplemental roll, under which she was certified to by the chiefs of said tribe as being a member of the Omaha Tribe of Indians. (See pages 35 and 36 of the Record.) She and her children were subsequently recognized in the payment of per capita annuity payments to the members of the Omaha Tribe of Indians, as shown upon pages 37, 38, 39, 40, 41, 44 and 48 of the Record. That subsequently in the year 1875, Artemesia Frost, the daughter of Margaret Sloan, and her grandson, were recognized as members of the Omaha Tribe of Indians, and paid their share of the per capita annuity payment, as shown by the record and roll on page 51. In the year 1890, Margaret Sloan

and her grandson, Thomas L. Sloan, received their per capita share of the tribal grass money, it being paid to them under the direction of the Council of the Omaha Tribe of Indians by persons known as the "Grass Commissioners." (Page 229 of the Record.)

In the year 1891, at a payment of annuity money made by Agent Spencer, an annuity was paid to Thomas L. Sloan and Margaret Sloan; that prior to this time in the year 1885 an issue of annuity goods was made to Margaret Sloan. (Page 66 of Record.)

That the land upon which Margaret Sloan made her home was selected by her in the year 1881, during which year a part of the land was broken up and cultivated. That during the year subsequent the land was improved by the building of a house, barn, shedding, digging a well, and setting out and planting trees. That this selection and improvement of the land was prior to the passage of the Act of Congress of August 7th, 1882. That subsequently, in the year 1893, other land claimed by Margaret Sloan was broken up and improved at a cost of over $1,700, as shown by pages 74 and 75 of the Record.

CASE NO. 475.

JOHN M. SLOAN is a son of Margaret Sloan and Thomas Sloan, and was a member of Margaret Sloan's family at the time various annuity payments were made to her and family heretofore referred to. He was also a member of Margaret Sloan's family at the time they established a home upon the present Omaha reservation, and he lived with the family there during the years 1858 and

1859. The members of the Margaret Sloan family are shown in the testimony of Artemesia Frost (page 90, Record), and during the time Margaret Sloan and her family were living upon the reservation John Sloan attended the Omaha Mission School, erected and maintained for the exclusive use of the Indian youth of the Omaha tribe. (Record, page 91.) John Sloan received an allotment of 320 acres upon the Nemaha reservation. He was an engineer, and in following his work was required to be away from the reservation; that in the year 1896, before starting to Alaska, he left a general power of attorney with his wife, Mrs. Malissa Sloan, under whose authority and direction the lands claimed in his bill were selected and improved and occupied. (See page 925 of the Record; also pages 928 and 929.)

CASE NO. 465.

ARTEMESIA FROST is the daughter of Margaret Sloan and Thomas Sloan and was recognized as a member of the Omaha tribe in the various annuity payments made to Margaret Sloan and family hereinbefore mentioned. She resided with her mother and family upon the Omaha reservation in the years 1858 and 1859, and received an allotment of land upon the Nemaha reservation. In the year 1874 Artemesia Frost, with her husband and family, removed to and established a home and residence upon the Omaha reservation; that while so residing upon the reservation she was recognized as a member of the Omaha Tribe of Indians by the payment of annuities to herself and child, Philemon H. Frost. The annuity payment is

shown upon page 51 of the Record. This payment is further testified to by her husband, Leonard L. Frost (pages 186 and 187 of the Record), and by Mrs. Artemesia Frost upon page 92 of the Record. All the children of Artemesia Frost have attended the various Indian schools provided for the exclusive education of the Indian youth and maintained by the United States Government, and by the Omaha Tribe of Indians, as shown by the Record. (Pages 100, 101, and pages 739 and 740.)

CASE NO. 468.

CHARLES FROST is a son of Artemesia Frost and one of the children hereinbefore referred to as having attended school at the Omaha Indian Agency, a school maintained exclusively for the use of the Omaha Indian youth. (See pages of Record, 739 and 740.) He was also an attendant at the Indian school known as "Haskell Institute," at Lawrence, Kansas, and was further educated at Hampton Institute, at Hampton, Va., where he was sent and maintained at the expense of the United States Government. (Record, pages 739 and 740.)

CASE NO. 471.

PHILEMON H. FROST, appellant, is a son of Artemesia Frost, and the oldest child of said Artemesia Frost. He was regarded as a member of the Omaha Tribe of Indians and paid, with his mother, at the annuity payment made in the year 1875. (Page 51.) He was an attendant at the Indian school at Haskell Institute, Lawrence, Kansas. (Page 740 of the Record.)

CASE NO. 472.

LEONARD FROST, appellant, is a son of Artemesia Frost, and one of the children hereinbefore referred to as attendants at the Indian school at Haskell Institute, Lawrence, Kansas, and who has selected land for allotment upon the Omaha reservation. (Page 740, Record.)

CASE NO. 459.

SARAH F. McCREARY, appellant, is a daughter of Artemesia Frost, and one of the children hereinbefore referred to as having attended the Indian school known as Haskell Institute, at Lawrence, Kansas, maintained by the Government for the exclusive use and education of Indian youth. That said appellant selected land upon the Omaha Reservation as the head of a family under the provisions of the fifth section of the Act of Congress of August 7th, 1882. (Page 740 of the Record.)

CASE NO. 463.

Thomas Barada is the son of Antoine Barada, being son of a full blood Omaha Indian woman, and is a member of the family of Antoine Barada, who was recognized, with his family, as a member of the Omaha Tribe of Indians, and who participated in the annuities paid per capita to the members of the Omaha Tribe of Indians, as shown in the several annuity rolls found on pages 37, 38, 39, 40, 41, 42, 43 and 44 of the Record. Antoine Barada is the same person who appears on the roll under the name of Mu-shu-num-pa-she, which identification between the names are

stipulated to upon page 66 of the Record. Thomas Barada did not obtain an allotment of land upon the half-bred reservation under the provisions of the treaty of July 15th, 1830, for he was born after the assignment and approval of the allotments on that reservation. He has been a resident upon the Omaha reservation since 1888, at which time he selected land as the head of a family. This land he has ever since occupied and has made valuable improvements thereon. (Page 338 of the Record.)

CASE NO. 469.

CELESTINE B. KUHN is a daughter of Antoine Barada and a member of the family which received annuity moneys as hereinbefore referred to in the case of Thomas Barada. She received an allotment of land upon the Nemaha half-breed reservation. This appellant, with her mother, moved to the Omaha Reservation in the year 1863 for the purpose of getting annuity money due her family, or her father's family. (Page 366 of the Record.) Celestine B. Kuhn came to the Omaha Reservation in the spring of 1883 and she and her family were residents upon the Omaha Indian Reservation at the time the Act of Congress of August 7th, 1882, went into effect. The consent of the Omaha Tribe of Indians was necessary to give said Act of Congress effect (Page 366, Record), and she was living upon the reservation before such consent was given. She selected land as the head of a family under the provisions of the fifth section of said act and is now in possession, use and control of said land. The land, when selected by her, was wild, unoccupied and unimproved land,

but since such time she has cultivated it and has built thereon houses, barns, shedding, corn cribs and various other necessary out-buildings to a total value of about $2,500.00. (See picture filed as original exhibit.) Her children had their tuition paid by the Indian office. (Page 762, Record.)

CASE NO. 467.

ETHEL KUHN RUTLEDGE is a daughter of Celestine B. Kuhn and was a resident upon the Omaha Reservation with her mother's family in the year 1883, prior to the Act of Congress of August 7th, 1882, going into effect by the Indians giving their consent thereto. She has been ever since and is now a resident upon the Omaha Reservation and has selected land to the amount of eighty acres. (Page 366, Record.)

CASE NO. 466.

EDWARD KUHN is a son of Celestine B. Kuhn, and was a member of his mother's family, living upon the Omaha Indian Reservation prior to the time the Act of Congress of August 7th, 1882, went into effect by the Indians giving their consent thereto. He has been ever since and is now a resident upon the reservation, and is occupying the land selected by him. Which land he is entitled to under the provisions of said act. (Page 366 of Record.)

CASE NO. 470.

STELLA KUHN is a daughter of Celestine B. Kuhn and was a member of her mother's family, living upon

the Omaha Indian Reservation prior to the time the Act of Congress of August 7th, 1882, went into effect by the Indians giving their consent thereto. She has ever since been a resident upon the reservation, occupying the land selected by her. Which land she is entitled to under the provisions of said act. (Page 366, Record.)

CASE NO. 456.

FRANK A. PETERS is a son of Euphrasia Peters, nee Barada, who was a daughter of Antoine Barada. Euphrasia Peters was a member of the family of Antoine Barada and as a member of such family received her share of the per capita annuity moneys paid to the members of the Omaha Tribe of Indians under the provisions of the treaty of March 16th, 1854, such payments being hereinbefore referred to in the case of Thomas Barada, Case No. 463. Euphrasia Peters, nee Barada, received an allotment of land upon the Nemaha Reservation under the provisions of the tenth article of the treaty of July 15th, 1830. Frank Peters selected land upon the Omaha Reservation in the year 1881, and the land he now occupies and has occupied continuously since 1885, is a part of the same land selected in 1881. Frank A. Peters has made many valuable and lasting improvements upon the land claimed by him by erecting buildings thereon, the planting of shade and ornamental trees, orchard trees and small fruits. In all of the value of about $3,000. (Pages 338 and 339 of the Record.) So also photograph, an original exhibit. The children of Frank A. Peters were educated in the district schools upon the reservation. He was allowed, out

of the Indian educational fund, per capita payment to the district for this purpose. (Page 358 of the Record.)

CASE NO. 454.

JOSEPHINE MITCHELL is a daughter of Euphrasia Peters, and was, in the year 1883, a resident upon the Omaha Reservation. This residence was established as a member of her mother's family prior to the taking effect of the Act of Congress of August 7th, 1882, by the Indians giving their consent thereto. She selected land upon the Omaha Indian Reservation in accordance with said act of August 7th, 1882, and is now living thereon. She has erected many valuable and lasting improvements upon the land thus selected. (Page 368, Record.)

CASE NO 455.

EMEIL PETERS is a son of Euphrasia Peters, and was, in the year 1883, a resident upon the Omaha Reservation. This residence was established as a member of his mother's family prior to the taking effect of the Act of Congress of August 7th, 1882, by the Indians giving their consent thereto. He selected land upon the Omaha Indian Reservation in accordance with the provisions of said act and is now living on said land. He has erected many valuable and lasting improvements upon the land thus selected. (Page 368, Record.)

CASE NO. 457.

WALTER V. PETERS is a son of Euphrasia Peters, and was in the year 1883 a resident upon the Omaha Reser-

vation. That such residence was established as a member of his mother's family prior to the taking effect of the Act of Congress of August 7th, 1882, by the Indians giving their consent thereto. He selected land upon the Omaha Indian Reservation in accordance with the provisions of said act, and is now living upon said land. He has made many valuable and lasting improvements thereon. (Page 368, Record.)

CASE NO. 458.

JACOB PETERS is a son of Euphrasia Peters, and was in the year 1883 a resident upon the Omaha Reservation. That such residence was established as a member of his mother's family prior to the taking effect of the Act of Congress of August 7th, 1882, by the Indians giving their consent thereto. He selected land upon the Omaha Indian Reservation in accordance with the provisions of said act and is now living upon said land. He has made many valuable and lasting improvements thereon. (Page 368, Record.)

CASE NO. 464.

MARY SAILORS is a daughter of Euphrasia Peters. She came to the reservation and selected her land in the year 1883, and in the year 1890 moved upon said land, and has occupied said land and resided thereon ever since. (Page 339, Record.)

CASE NO. 473.

MAGGIE ROCKWELL is a daughter of Euphrasia Peters. She came to the reservation and selected land first

in 1881 and again in 1883. In 1885 she broke up the land and planted thereon several bushels of walnuts. She did not establish a residence upon the reservation at that time because the officials at the agency objected to her going upon the reservation for the purpose of establishing a home. She has ever since claimed and still continues to claim the land so selected as her own under the provisions of the act of August 7th, 1882. (Page 339, and pages 878 and 879 of the Record.)

CASE NO. 461.

MITCHELL MONETTE, ET AL. This case was brought by the appellants as the heirs of Mary Monette. It is stipulated that Mary Monette was the daughter of La-ta-da-we, a full blood Omaha Indian woman. Mary Monette was recognized as a member of the Omaha Tribe of Indians by the payment of annuity money to her as a member of the Omaha Tribe of Indians in the year 1856, by her maiden name, Mary Bono. (Pages 38 and 489 of Record.) The brother of Mary Monette, being a child of the same mother, and all of his immediate family, are at this time recognized as members of the Omaha Tribe of Indians. Mary Monette, prior to her death, selected land for an allotment and paid for the breaking and the making of improvements thereon. (Page 492, Record.)

CASE NO. 460.

JENNIE M. ARNOLD is a daughter of Mary Monette. Jennie M. Arnold, with her two children, removed to the Omaha Reservation and took up a residence there

in the year 1890, during which time she selected land for allotment for herself and minor children. While living upon the reservation, her children were sent to the Omaha Indian Agency school, maintained for the exclusive use and education of Omaha Indian youth, and thereafter her children were sent to school at the Grant Institute, Genoa, Nebraska, a school also maintained by the Government for the exclusive education of Indian youth. (Page 489 of the Record.)

CASE NO. 462.

CASSIE M. KARCH is a daughter of Mary Monette. In the year 1890 she selected land for allotment, which land she has ever since occupied, improved and claimed for an allotment under the provisions of the act of August 7th, 1882. (Page 489 of the Record.)

CASE NO. 474.

MITCHELL MONETTE is a son af Mary Monette. He came to the Omaha Reservation with his mother in the year 1891, at which time he selected for allotment a tract of land upon which he has built a house. He has continuously occupied and cultivated said land since said time. (Page 489, Record.) The tuition for the education of his children was paid for by the Indian office. (Page 762 of Record.)

CLAIMS OF THE DEPARTMENT.

The right of these several claimants to an allotment of land was denied by the Department for the following reasons:—

First.—Because the ancestors of these claimants had received allotments upon the Nemaha Reservation under article ten of the treaty of 1830.

Second.—Because these claimants were not residing upon the Omaha Reservation at the time of the adoption of the treaty of 1865. (Page 167 of Record.)

The record discloses this denial by the Department of the rights of these appellants did not proceed from any settled construction of the operation and effect of the treaty of 1830, or of the subsequent treaty of 1865 for the reason a large number of Indians against whom every objection raised against these claimants could be made, received allotments.

Turning to the table at page 244 it appears Mary Jane Paul and her children received allotments under the treaty of 1830, and all of her lineal descendants, including her said children, have received allotments upon the Omaha Reservation under the act of 1882. (Pages 19 and 22 of Record.) No one of them was residing upon the Omaha Reservation in 1865 or 1866. Some of her descendants, allottees, are not now and never have resided upon the Omaha reservation. (Pages 77, 78, 79 of Record.)

The table shows the same situation exists as to the descendants of Antoine Barada—who have received allotments—and as to all of the descendants of John Pilcher. The court below held the fact the ancestor of a claimant

had taken an allotment upon the Nemaha Reservation did not conclude the claimant from an allotment under the act of 1882, and further, that a member of the Omaha tribe, whether full or mixed blood, could not be deprived of an allotment under the act of 1882 because he did not happen to reside upon the Omaha Reservation in 1865. The court further held if the claimant himself had taken land upon the Nemaha Reservation, or if the claimant did not personally reside upon the Omaha Reservation when the act of 1882 became a law, in either event he was not entitled to an allotment under that act, and applying these conclusions to the facts proved in the several cases pending, decided that Thomas L. Sloan and Garry P. Myers were entitled to the allotments sued for, and that the other appellants were debarred therefrom. (Page 259 of Record.)

SPECIFICATION OF ERRORS RELIED ON.

A separate assignment of error will be found in the printed record in each case. The errors assigned in No. 453 cover all the questions presented in all the cases.

And for that reason we print here the errors assigned in that case.

First.—The court erred in finding and determining that Margaret Sloan received an allotment of land in the Nemaha Reservation and was for that reason debarred from claiming a further allotment upon the Omaha Reservation.

Second.—The court erred in construing the treaty between the United States and the Omaha Tribe of Indians, made July 15th, 1830, as meaning and intending that the taking of an allotment of land by a member of such a tribe pursuant to article 10 of said treaty thereby extinguished the claim of such Indian to further allotment of land or further allotments or benefits in the tribal property as a member of such tribe.

Third.—The court erred in construing the treaty between the United States and the Omaha Tribe of Indians, of July 15th, 1830, as meaning and intending that half-breed members of the reservation tribe who secured allotments of land in severalty in the Nemaha Reservation under the terms of said treaty are not entitled to a second allotment under the act of 1882, although at the time of is passage they were residing on the reservation in the tribal relation.

Fourth.—The court erred in construing the treaty made between the Government of the United States and

the Omaha Tribe of Indians on March 6, 1865, as excluding from allotments of land thereafter to be made and from participation in the division of the property belonging to said Omaha Tribe of Indians, all Omaha Indians not then residing upon the reservation and with said tribe.

Fifth.—The court, after construing the treaty of March 6th, 1865, as not excluding from allotments of land those persons who were not on the reservation at such time, erroneously holds that such persons are deprived of their tribal rights, if they were not *bona fide* residents on the Omaha Reservation on August 7th, 1882, the date of the passage of said act.

Sixth.—The court erred in holding that the complainants were not members of the Omaha Tribe of Indians under the various treaties between the United States of America and the said Omaha tribe.

Seventh.—The court erred in construing and declaring that the Act of Congress of August 7th, 1882, referred only to Omaha Indians then residing upon the reservation of said tribe with the members thereof.

Eighth.—The court erred in holding that a person of mixed blood who did not reside upon the Omaha Reservation at the date of the passage of the act of August 7th, 1882, but who did reside thereon afterward and prior to the time when the tribe gave the consent required to render the act effective, is deprived of his allotment of land thereon and his benefits in his tribal property.

Ninth.—The court erred in assuming that the residence of a member of the Omaha tribe of Indians off of the reservation terminated his right to an allotment of

land or right to participate in the common tribal property.

Tenth.—The court erred in adjudging and determining that Margaret Sloan, at the date of her death, was not vested with the title to the land she was occupying in such sense that her death devolved or vested any title thereto in her heirs.

Eleventh.—The court erred in holding and determining that Margaret Sloan at the time of her death was not entitled to claim and have allotted to her the land described in plaintiff's bill of complaint, to-wit: the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter of section thirty-five (35), township twenty-five (25) north of range seven (7) east, and the north half of the northeast quarter of section twenty (20), township twenty-four (24), north of range eight (8) east, and that such described property did not vest in complainants, the heirs-at-law of said Margaret Sloan, at the time of her death.

Twelfth—The court erred in that the court, by its judgment and decree in said cause, found upon the merits of the case for the defendants and against the complainants.

Thirteenth.—The court erred in that the injunction granted in said cause was dissolved and the suit dismissed at costs of the complainants.

Wherefore, complainants pray that said decree be reversed and that complainants be restored to all things lost by reason thereof.

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Following the opinion of the trial court the cases divide themselves into three classes.

First.—The cases in which the court below found the claimants were members of the Omaha Tribe of Indians but were not entitled to an allotment of land solely for the reason they were not residing upon the reservation on August 7th, 1882., This class includes all the cases except No. 453.

Second.—The cases in which the claimants had received allotments of land upon the half-breed reservation agreeably to the provisions of the treaty of July 15th, 1830, and were therefore deemed not entitled to allotments under the act of 1882.

Such claimants are found in cases Nos. 453, 461, 475, 465 and 469. In the last two cases, 465 and 469, the circumstances apply to the said complainants, but not to their minor children, for whom they are also suing. These children fall within the first class.

Third.—The cases in which the claimants made their selections upon the Omaha Reservation and applied for allotments in the manner provided by law, but died before an adjudication of their rights occurred, in which event the court below held the heirs-at-law of the deceased claimant did not succeed to and could not enforce such right. The cases are Nos. 453 and 461.

Assignments of Error numbered 4, 5, 6, 7, 8 and 9 relate to the conclusion reached by the trial court in the first class above enumerated and may conveniently be discussed together. The tenth assignment of error applies to the third class, and all other assignments not above enumerated to the second class.

ARGUMENT.

FIRST CLASS.

All the appellants are descendants of two full blood Omaha Indian women, La-ta-da-we, who married Francis Bono, and Taegleha Hacienda, who married Michael Barada.

Certain of the descendants of each were denied allotments under the act of August 7th, 1882, and certain others of such descendants were fully recognized, allotted lands and paid annuities. All derived their rights from the same source and all were subject to the same usages and customs of the tribe and entitled to the same treatment. Under a uniform rule fairly applied all would enjoy the same consideration by the officers of the government charged with the duty of carrying the laws and treaties into effect.

This consideration we insist upon. The appellants should not be made exceptions to a long continued policy established and carried into effect by the tribe and the Department. Out of 144 of the descendants of Taegleha Hacienda 99 are enjoying their allotments and annuity payments, 50 are denied.

The children of La-ta-da-we were Mary Monette and Orrin Mitchell. Mary Monette and family have been denied, Orrin Mitchell and family recognized.

The recognition of these appellants or their immediate ancestors in the payment of annuity moneys and by enrollment duly certified to by the chiefs and head men of the tribe, and also by the officials of the government charged with the duty of determining who were entitled

thereto under the laws and treaties constitute an adjudication of the rights of the parties who were so paid. The judgments stand unless they can be set aside for want of jurisdiction in the parties making such decision, or for fraud. These adjudications or judgments in favor of these appellants or their ancestors have stood and now stand unchallenged.

The allotments to some of these appellants upon the half-breed reservation under the treaty of 1830 (See page 61 of Record), was a judgment in favor of such persons and established the fact they were members of the Omaha Tribe of Indians. This court, in passing upon that schedule, said:

> "And it may be admitted that the decision of the special agent in identifying the Indian half-breed entitled to participate, and in alloting the portion of each, would, in the absence of fraud, be conclusive."
>
> *Hegler vs. Faulkner,* 14 Sup. Ct. Rep. 779. Citing *Wilcox vs. Jackson,* 13 Pet. 489.

The treaty of July 15th, 1830, will be more particularly considered in the argument in the second class of appellants.

The treaty of 1854 between the Omaha Indians and the United States is the foundation and beginning of every right and benefit the tribe or the individuals of the tribe have since enjoyed. Prior to 1854 the Omaha Indians occupied their lands as Indian Country. It was the right to hunt over and occupy with the fee resting in the government. The main Omaha village was at Bellevue, about seven miles south of the City of Omaha. The removal of

the Indians was desired by the citizens of Omaha, and the treaty of 1854 was the result. By this treaty the Omaha Indians ceded to the United States all their country, and out of it received a reservation. The payments of money down to 1890 with but few exceptions were provided for in this same treaty. The treaty of March 6th, 1865, provided for a sale of a part of the reservation created by the treaty of March 16th, 1854, and the treaty of 1865 gave rights of allotment similar to those set forth in the previous treaty. The Act of Congress of August 7th, 1882, provided for the sale of a part of the Omaha Reservation created by the treaty of March 16th, 1854, and for an allotment of the balance of the land.

The provision in the act for the sale and for the allotments was only the carrying out of the intention of the parties to the original treaty. The members of the tribe who were entitled to allotments under the treaty of 1854 were entitled to allotments under the subsequent treaty of 1865 and Act of Congress of August 7th, 1882. In construing the treaties and the Act of Congress together it clearly appears there was no intention on behalf of the government or of the Indians to cut off any one who was once a member of the tribe, or to deprive him of any of his individual rights. The right of Margaret Sloan to an allotment upon the Omaha Reservation existed from the year 1854 to the time of her death in December, 1898. This same right to an allotment existed on behalf of all her children who were enrolled with her. It existed on behalf of Antoine Barada and his children, who were enrolled with him, and also existed as to Mary Bono and her children.

The ancestors of these appellants being members of the tribe, it follows the usages and customs of the tribe in the recognition and enrollment of children born to members of the tribe must apply to them. Children of recognized members of the tribe and the descendants of such persons are recognized as members of the Omaha tribe by blood and by usages and customs of the tribe.

The rolls of the first payment ever made show that half-breeds were recognized as members of the tribe. (Pages 35 and 36, Record.) Upon the last roll of a payment made to the Omaha Tribe of Indians 79 children of white men were recognized as members of the tribe and paid annuity moneys. This roll was paid in December, 1901, and contains 79 names of such persons ranging in ages from 2 months to 68 years. (Pages 53, 54, 56 and 232, Record.) The lists together show 134 persons who have only one-half Omaha Indian blood or less who are enrolled as members of the tribe. Thirty-three of the total are the children of full-blood white mothers, the fathers being of part Omaha Indian blood, and the balance are the children of white men and mixed blood women who were allotted lands but who have relinquished their tribal rights among the Omahas and have been adopted into the Osage Tribe of Indians.

These lists, taken with the evidence, show it is the custom and usage of the Omaha Tribe of Indians to enroll the children born to members of the tribe without reference to the degree of blood, or which parent was a member of the tribe.

There must be a positive enactment of a statute in

order to change the custom and usage of an Indian tribe or band.

Wall vs. Williams, 8 Ala. 48.
Boayer vs. Dively, 58 Mo. 510.

W. A. Jones, Commissioner of Indian Affairs, reporting to the Secretary of the Interior, makes the following statement:

"Reference is also made to the doctrine laid down by the Supreme Court of the United States to the effect that usage is evidence of the construction given to a law, and must be considered binding on past transactions. (*U. S. vs. Macdaniel,* 7 Pet. 1.) And that the acts of the legislature ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt and to show a clear design to effect the object.

Rutherford vs. Green, 2 Wheat. 201.
U. S. vs. Arrenddo, 6 Pet. 732.

"It appears to this office that such applicants or allottees have such a vested right in the lands applied for or allotted as to be able to maintain an action for the same under a clause contained in the Indian appropriation Act approved August 15th, 1894."

Report of the Commissioner of Indian Affairs, 1899, pages 48 and 49.

"A claim of membership in an Indian tribe may be established by the laws and usages thereof, although such recognition may not be in harmony with the general rule that among free people the child of married parents follows the condition of the father."

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Black Tomahawk vs. Waldron, 19 Dec. Dept. Int. P. L. 311.

Same vs. William Banks, 26 Dec. Int. P. L. 71.

"The right to receive an allotment under the act of February 8th, 1887, as defined in the Departmental regulations authorized by section 3 thereof, requires the applicant to be a recognized member of an Indian tribe, or that the father or mother of the applicant should have been so recognized."

Julia Cox, 22 Dec. Dept. Int. Pub. Lands 167.

"The question of whether or not the Sioux half-breed or quarter blood is an Indian within the meaning of the act of March 2d, 1889, chapter 405, is to be determined not by the common law, but by the laws or usages of the tribe."

"Such laws and usages are not matters of which judicial notice can be taken, but present questions of fact upon which the attorney general can not advise."

"Affirmatively, a person apparently of mixed blood residing upon a reservation and claiming to be an Indian is, in fact, an Indian."

Sioux Mixed Blood, 20 Op. Atty. Gen'l. 711.

The greatest question of this kind that has come up has been among the five civilized tribes of the Indian Territory, and Congress, dealing with the question, directed the following rule of decision for the Commission:

"That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to

the rolls, usages and customs of said nations or tribes."

29 U. S. Stats. at Large, 323.

The rule by which allotments were made to Omaha Indian women as heads of the family where their husbands were not entitled to allotments has been expressly set forth in the report of the Commissioner of Indian Affairs for 1899, page 46, as follows:

> "Under the fourth section of the general allotment act approved February 8th, 1887 (24 Stats. 388), Indians residing upon the public domain are authorized to make application for allotments of land. Under that section the secretary of the Interior issued the following circular, dated September 17, 1887, prescribing rules and regulations regarding allotments to Indians of the United States lands not otherwise appropriated. This circular contained the following instructions:"
>
> "Indian women married to white men, or to other persons not entitled to the benefits of this act, will be regarded as heads of families. The husbands of such Indian women are not entitled to allotments, but their children are."

Congress has fixed the status of the children of a white man and Indian woman by the following enactment:

> "That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to property of the tribe to which the mother belongs or belonged at the time of her

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death, by blood, as any other member of the tribe, and no prior act of congress shall be so construed as to debar such child of such rights."

30 U. S. Statutes at Large, 62-90.

This act gives statutory effect to the usages and customs of the Indian tribes under which all the appellants have the rights of Omaha Indians.

The recognition of an Indian woman as a member of a tribe, she being of the blood of that tribe, gives to her children all the rights possessed by members of the tribe.

And further, no act of Congress should be so construed as to debar such children of such rights.

The Act of Congress of August 7th, 1882, provided for allotments to Omaha Indians. No distinction is made as to blood or residence and this court is called upon to construe the law as it is.

In the history of Indian affairs two distinct policies have been in force. During the time the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles were treating for western lands they and the white settlers among them were not in harmony. The treaties then promulgated show an intention on the part of the Indian to acquire a territory where they could, without conflict, develop and maintain their nationality. The Government was anxious to remove them from the country where they were in conflict with advancing civilization.

The Indians, for the purpose of creating and maintaining their nationality, required that all who should have the benefit of their treaties must remove to and reside upon the lands set apart for them. This they further enforced by legislative acts of their National Council.

Upon these treaties and policies the requirement was made that members of the tribe should live in the tribal relation, and a failure to do so was a forfeiture of their rights. The treaties which they made provided for the giving of property to the persons remaining in the ceded country, and that they should become citizens of the states where they were then located.

No such provision appears in any of the Omaha treaties, and the policy on the part of these Omaha Indians and the Government in dealing with them has been to abolish the tribal relation and to advance the individual toward citizenship.

There being no statutory requirement of residence to entitle an Omaha Indian to an allotment under the act of 1882, the court erred in holding that residence upon the reservation at the date of the approval of the act was necessary in order to secure such allotment.

In re application of Jasper C. Halloway for payment of annuities, Willis Vandevanter, Assistant Attorney General, says:

> "I quote from the opinion in the Banks case the following remarks, as applicable to the case now under consideration:
>
> "'It has been the declared policy to encourage the breaking up of tribal relations among the Indians and different laws have been enacted with that end in view. The act of March 3, 1875, (18 Stat., 402-420), conferred the benefits of the homestead law upon Indians who had abandoned their tribal relations, but with a proviso as follows:
>
> "'"Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal

funds, lands and other property the same as though he had maintained his tribal relations."

"'The allotment act of February 8th, 1887, (24 Stat., 388), declares every Indian who has taken up his residence separate and apart from his tribe and has adopted the habits of civilized life, a citizen of the United States "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." In view of these provisions of law it must be held that Banks did not, by severing his tribal relations, give up his distributive share in the tribal property, and that consequently he is entitled to an allotment in the lands of said tribe.'"

In *People vs. Cayuga Indians*, 41 N. Y. Sup. Ct. Rpts. 588, this question is also considered:

"That since, on account of their participation in the war of 1812 and 1814, as subjects of the British crown, no portion of the annuity has been paid them, but the whole sum has been distributed among the branches of the nation within the United States. The court said:

"'They stand on the treaty granting this annuity. For that annuity their ancestors sold their land. The state has had the consideration, and must pay the purchase money. And the state must pay to the lawful claimants; not arbitrarily to those whom they prefer. If the state establishes a tribunal to determine who are entitled, these petitioners must be heard and their rights legally passed upon.'

"Suppose the treaties of 1798 and 1795 had never been made, all of these, who are now the posterity of the Cayugas of the date of those treaties, would have had their rights in this great property. All of them would practically have been owners of it.

> They should all have some rights now in the annuity, which was promised in payment for the land. It matters not where they live, whether under this government or under that of England, their rights are the same. Nor does it matter that they are broken up into portions and can no longer be called one nation, or that their several rights are thus in conflict. So far as is possible, the rights of all should be protected, so that, in the way best suited to their habits, every famliy or individual should enjoy the benefit of the annuity. We are of the opinion that the relief asked by the relators should be granted."

The Omaha Indians and the Government did not require residence upon the reservation. (Pages 77, 78, 133 and 517 of Record.)

Neither could mixed bloods terminate their tribal relations. (Page 240 of Record.)

A reasonable conclusion is that those of the appellants who have been recognized as members of the tribe continue as such members. They could not terminate that relation without the consent of the United States, expressed in some law or treaty. This not having been given, the usages and customs of the tribe apply in fixing and determining the rights of their children.

"INDIAN—*When Under Charge of an Agent.*

> When a tribe of Indians is placed under the charge of an Indian agent by treaty or otherwise, each member of such tribe is under the charge of such agent, within the purview of section 3129 of the Revised Statutes, and no member thereof can dissolve his tribal relation or escape from such charge by ab-

senting himself from such reservation, or otherwise, without the consent of the United States.

Same.

An Indian boy in Oregon, who left the locality of his tribe and lived with a white family until his tribe had entered into treaty relations with the United States and gone upon a reservation in pursuance of such treaty, and until he was 23 years of age, and then went to live upon such reservation as a member of his tribe, could not thereafter, by simply absenting himself from the reservation, dissolve his tribal relation or cease to be under the charge of the agent of such reservation.

Intercourse with Indians.

It is the duty of Congress to regulate the intercourse with the Indians, and to that end they may provide for punishing the giving of spirituous liquors to them on or off a reservation within or without a state."

"It does not appear that the tribal relation of Thomas has been dissolved by any act of the government, or that it has in any way consented to or acquiesced in any such purpose on his part. And, without such consent, we do not think the relation can be dissolved, as against the United States, after being recognized by it. But in the absence of any law or regulation made or authorized by Congress to that effect, mere absence from the reservation, however prolonged, is not proof of such consent, because it may occur without the approval of the government, and it may take place with the consent of the agent for some lawful purpose, and with intent to return.

U. S. vs. Earl, Fed. Rep., Vol. 17, pages 75 and 78.

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens of the United States on application to a court of the United States, for naturalization, and satisfactory proof of fitness for civilized life.

"But the question whether any Indian Tribes or any members thereof have become so far advanced in civilization that they should be let out of the state of pupilage and admitted to the privileges and responsibilities of citizenship, is a queston to be decided by the nation whose wards they are and whose citizens they seek to become; and not by each Indian for himself."

Elk vs. Wilkins, 112 U. S., pages 645 and 648.

That all of the claimants in these cases were both by birth and recognition at one time members of the Omaha Tribe of Indians cannot be doubted. That at the time of the passage of the act of 1882 the Omaha Tribe of Indians had a potential political existence, recognized by the government, is likewise true. The act in question includes every member of the tribe, none are excluded from the benefits conferred.

The question, and the only question, to be determined is, were these claimants members of the tribe when the act was adopted or became operative. With membership once

conceded, it was not within the power of the individual Indian, or of the tribe, to accomplish expatriation. Furthermore, it was not within the power of the administrative department of the government to accomplish expatriation except pursuant to some statute or treaty.

The policy of the government has been to induce the individual member of the tribe to abandon his tribal relation and adopt the habits, manners and customs of civilized life and to qualify him for American citizenship.

Millions of dollars have been appropriated for this purpose. Every energy of both the legislative and administrative departments have been devoted to this end. This court is asked to say the act of Congress of 1882 was intended to punish the Omaha Indian who separated himself from his tribe and who did adopt the habits, manners and customs of the civilized people, and who did carry out the wishes of the Government in this behalf, by depriving him of his interest in the property held in common by his tribe.

The rule here contended for is—that the persons who are now members of the Omaha Tribe of Indians are those who were members of the tribe in 1854 and their descendants; that the right to an allotment under the treaty of March 6th, 1865, and the Act of Congress of August 7th, 1882, is but a continuation of the right to an allotment under the treaty of March 16th, 1854.

Under this rule all of the appellants are members of the tribe and entitled to their respective allotments.

SECOND CLASS.

In construing the tenth article of the treaty of July 15th, 1830, as meaning and intending that the taking of an allotment of land under said article was to extinguish the right of said claimant to any further or other allotment of land and to prevent the taking of an allotment under the Act of August 7th, 1882, is the reading an intention into the treaty not therein expressed or clearly implied by any of the language used, and is not supported by any proof of the intention of the parties to the treaty. In the absence of such intention expressed or implied by the parties to the treaty, such construction is adding to the treaty instead of construing it. No such construction was given to the treaty either by the Indians or by the Government for the annuity payments participated in by the appellants or their immediate ancestors (pages 44, 45, 47, 48, 49, 50 and 51, Record), were, after all, the obligations under the treaty of 1830 had passed under said tenth article of the treaty. (Page 25, Record.) As further showing no such intention was in the minds of either the Indians of the Omaha tribe, or of the Government officials charged with the duty of carrying into effect the laws and treaties relating to this tribe, it appears in the schedule of allotments made under the fourth article of the treaty of March 6th, 1865, assignments were then made to persons who had received allotments upon the Nemaha half-breed reservation under the provisions of the tenth article of the treaty of July 15th, 1830.

The statement made by the Department that it was the universal rule to exclude from allotment under the

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Act of August 7th, 1882, all persons who had previously obtained allotments under the treaty of 1830, is not substantiated by the table of allotments shown upon page 82 of the Record. This table discloses the names of seventeen persons who received allotments under the treaty of 1830 and under the act of 1882, as members of the Omaha Tribe of Indians. Members of other tribes who received allotments under the treaty of 1830 have subsequently received allotments of land under various other acts applying to the particular tribes to which such persons belonged.

All of the Omaha Indians who received allotments under the act of 1830 have since received allotments upon the Omaha Reservation except the claimants in these several suits.

That there was no intention of cutting off the persons who received benefits under the treaty of 1830 from the enjoyment of their other tribal rights, is shown from the following facts: In making the survey of the half-breed reservation a portion thereof was wrongfully excluded and sold as a part of the public domain. In making a correction of the original survey, it was found there was a deficiency and that a large number of persons, half-breeds and mixed bloods, who were entitled to the benefits under the provisions of the tenth article of the treaty were deprived of their rights.

The United States, in making up to them the loss they had thus sustained, appropriated a sum equal in amount to $1.25 per acre for every acre so wrongfully excluded. This sum was divided per capita among the Indians who failed to receive their lands. The list showing such persons is found upon pages 27 and 28 of the Record.

The Act of Congress, providing for the payment of this money, specifically sets forth that their receipt shall be a relinquishment of their right and claim to the deficiency in the half-breed reservation. It clearly appears that by accepting this benefit they were not relinquishing or releasing any of the rights or benefits which they had in common as members of the Omaha Tribe of Indians. The twelfth article of the treaty of July 15th, 1830, specifically sets forth "that nothing contained in the foregoing articles shall be construed so as to affect any claim, or right in common, which has heretofore been held by any tribes, parties to this treaty, to any lands not embraced in the cession herein made; but that the same shall be occupied and held by them as heretofore."

Richard Olney, attorney general of the United States, in Opinions of Attorney Generals, Vol. 20, page 747, says:

> "Mrs. Van Meter subjected herself to no estoppel as against the Sioux Indians by taking the scrip. It represented individual property; perhaps, even, a wholly unlooked for bounty from the U. S. Government. Nor was Mrs. Waldron subject to any estoppel in 1889 as against the United States, which dealt with the Sioux Nation as a body. It is well settled that an Indian may hold individual property under treaty allotment and at the same time rejoin her tribe without objection, so far as the United States is concerned. (*Pennock vs. Commissioners,* 103 U. S. 48.)
>
> "For these reasons I do not think that the treaty of 1830, or any of the proceeedings thereunder, overthrow the presumption arising from Mrs. Waldron's race, residence and claim to Indian citizenship, and the recognition of said claim by the United States

officials before and at the time of the agreement of 1889."

All of the acts of the Indians and of the United States Government during the period from July 15th, 1830, down to May, 1883, the date when the allotments were made under the act of 1882, have been in conformity with the treaty except as to these appellants, and have been in direct opposition to the construction given to said treaty by the court below in these cases.

The construction adopted by the trial court is not sustained by any evidence of the intention of the parties to the treaty. The duty of the court is to construe, not to make, as this court has well said:

> "In the first place this court does not possess any treaty making power. That power belongs by the constitution to another department of the government; and to alter, amend, or to add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make and not construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and found that, our duty is to follow it as far as it goes, and to stop where it stops—whatever may be the imperfection or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have the right to annex the form of the passport. It is a high act of sovereignty, as high as the formation of any other stipulation of the treaty."
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> *The Amiable Isabella*, 6 Wheat. 71.

THIRD CLASS.

In this class we have the cases of John M. Sloan, et al., No. 453, and Mitchell Monette, et al., No. 461.

Margaret Sloan, as a half-blood member of the Omaha Tribe of Indians, received an allotment under the provisions of the treaty of 1830. (Page 61 of the Record.) Being recognized as an Indian woman she had the right to select land under the provisions of the treaty of March 16th, 1854, and also under the provisions of the fourth article of the treaty of March 6th, 1865. She made her selection of 160 acres upon the Omaha Indian Reservation, and lived upon and improved this land before the Act of Congress of 1882 was passed.

Her sister, Mary Jane Paul, who received an allotment under the treaty of 1830, received an allotment in pursuance to the act of August 7th, 1882. Under the rules as to the making of allotments to Omaha Indians, Indian women married to white men were allotted as the heads of the families. Margaret Sloan was, therefore, the head of a family and entitled to select and hold 160 acres of land as her allotment. The fact her grandson was living with her at the time this selection was made was sufficient to make her the head of the family. (Page 64 of the Record, *Ladiga vs. Roland,* 2nd Howard, 581.)

She made her selection as the head of a family and reported it to the agent. All other acts were those devolving upon the agents and officials of the Indian office and the Department of the Interior. What was then left to be done, ought to have been done by the Government and its agents. The failure and refusal of such officials to do

their duty should not deprive her of her legal right, which she persistently maintained from the year 1881 to the time of her death, in December, 1898.

The principal object of the act of 1882 was to break up the tribal relation and create estates of inheritance. This could not be accomplished if the death of the claiming allottee before the approval of the Secretary extinguished the selection. On some reservations such a rule would create consternation. Among the Winnebagoes the selections made in the year 1887 were not approved by the Secretary of the Interior until December, 1893. Of about one thousand who selected land in 1887 a number died before December, 1893, but such allotments were approved and patents issued.

The Department has not placed such a construction upon the allotment laws. The Sioux Act, under which allotments have been made (March 2, 1889; 25 Stats. at Large, 888), and in which the title granted is identical with that of the Omaha allotment act, and the general allotment act known as the Dawes Bill of February 8, 1887, (24 Stats. at Large, 388), were not so construed.

Section 5 of the act of August 7th, 1882, under which the Omahas were allotted, shows who are entitled to allotments and the quantity of land to each. Section 1 of the act of February 8, 1887, under which the Indians generally have been allotted, shows the persons entitled to land and the quantity to such persons. Section 8 of the act of March 2d, 1889, under which the Sioux have been allotted makes the same provision. Section 6, of the Omaha Act, Section 5 of the General Allotment act and Section 11 of the Sioux act provide for the kind of patents to be issued

to the allottees. They are identical except in so far as they differ in their application. The Omaha act provides for the descent according to the laws of Nebraska, the general act and the Sioux for the descent of the land according to the law of the state or territory where the land is situate. The following decisions shows the construction adopted by the Department of the Interior:

> "In the cases presented it appears that the Indians made their application as required by law, which were received by the local officers who certified that there were no prior valid rights thereto. The Indians had done all that was required of them, and the fact of their decease after the acceptance of their selections cannot, in my judgment, militate against the right of the heirs to the land selected by them. Besides, section 11 expressly provides for the issuance of a patent upon the allotment where the allottee has died after the allotment and prior to the issuance of a patent thereon. The trust is for 'the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs,' and after the expiration of the trust a patent to be issued 'to said Indian or his heirs as aforesaid in fee.'
>
> "Heads of families and single persons over 18 are required to select for themselves, and to do this must be alive. In the case presented the selections have been made, and it only remains for the Department to carry out the wishes of those authorized to make the same to secure to the heirs of the applicants the use of the lands so selected.
>
> "I am, therefore, of the opinion, and so advise you, that where selections of land have been received in the local land office under the provision of said

section 13 of the act of 1889, and there is no prior valid claims thereto, the same should be duly allotted, and in case of the death of the allottees prior to such approval, patents should issue as required in section eight."

Sioux Indian Lands—Allotments, 14 Land. Dec. 463.

Section 13 gives the same right to Indians in the ceded country and public domain as section 8 bestows within the limits of the reservations.

Under the general allotment act the following decision has been had by the Department of the Interior.

"Where an allottee dies after selection and prior to approval, the allotment will, upon approval, be confirmed to the heirs of the deceased allottee.

"Patent should issue in the name of the heirs generally, where the allottee dies prior to the issuance of the patent."

Florence May Ree, 17 Land. Dec. Int. Dept. 143.

Under the equity maxim that "Equity regards that done which in good conscience ought to be done," the selections of these appellants should be approved.

Taylor v. Benham, 5 Howard, No. 269.
Peter v. Beverly, 10 Pet. 571.

The appellants in these several cases selected their land with the firm belief they were entitled under the laws to the same rights as were bestowed upon the other members of their family. They have occupied and cultivated the lands thus selected for many years, and have placed valuable improvements thereon. They have built homes,

educated their children, and have followed the habits and customs of civilized life. In so doing they have carried out the wishes of the Government in this behalf. To deprive them of their allotments would be fixing a penalty for doing the very things the Government has asked them to do.

The appellants are not aliens, for they were born in this country. There has never been a desire or intention upon their part to relinquish their membership in the tribe and become citizens of the United States. There is no law or treaty by which they could expatriate themselves from the tribe, even if they so desired. They remain members of the Omaha Tribe of Indians, and as such members have a vested interest in all of the tribal property. We firmly believe they are entitled, as their pro rata share of the tribal lands, the selections made by them upon the Omaha Reservation.

Respectfully submitted,

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